

April 9, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Names of Petitioners: Franklin C. Tucker

Date of Filing: February 2, 2005

Case Numbers: TBH-0023

This Initial Agency Decision concerns a whistleblower complaint filed by Franklin C. Tucker (the Complainant) against his previous employer, BWXT Y-12, L.L.C. (BWXT) under the Department of Energy's (DOE) Contractor Employee Protection Program, 10 C.F.R. Part 708. BWXT is the manager of Y-12, part of the National Nuclear Security Administration's Nuclear Weapons Complex.

The Complainant filed the complaint of retaliation against BWXT with the Oak Ridge Operations Diversity Programs and Employee Concerns Office on October 20, 2003.^{1/} In the complaint, the Complainant contends that he made protected disclosures to officials of BWXT and the DOE, and that BWXT took four adverse personnel actions against him in retaliation for these disclosures. BWXT admits that the Complainant made protected disclosures and that the four personnel actions occurred. However, BWXT argues that it would have taken those four actions absent the Complainant's protected disclosures. Later in this decision, I find that BWXT has shown by clear and convincing evidence that it would have taken the personnel actions against the Complainant absent his protected disclosures.^{2/}

^{1/} When this matter was sent to the Office of Hearings and Appeals by the Oak Ridge Operations Office Diversity Programs and Employee Concerns Manager his letter indicated that the complaint was filed with his office on November 25, 2003. I do not see that date on any of the filings made by the Complainant. The original complaint was dated September 23, 2003, by the Complainant and received on October 20, 2003, by the Office of Diversity Programs and Employee Concerns. Therefore, I will use the October 20, 2003 date in this Decision.

^{2/} The Complainant seeks as restitution for the alleged retaliations that he be reinstated as a BWXT employee and be compensated for harassment. He also requests that the Shift Manager be relieved (continued...)

I. Background

A. The DOE Contractor Employee Protection Program

The DOE's Contractor Employee Protection Program was established to safeguard "public and employee health and safety; ensur[e] compliance with applicable laws, rules, and regulations; and prevent fraud, mismanagement, waste and abuse" at DOE's government-owned, contractor-operated facilities." 57 Fed. Reg. 7533 (March 3, 1992). Its primary purpose is to encourage contractor employees to disclose information which they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from consequential reprisals by their employers.

The regulations governing the DOE's Contractor Employee Protection Program are set forth at Title 10, Part 708 of the Code of Federal Regulations. The regulations provide, in pertinent part, that a DOE contractor may not discharge or otherwise discriminate against any employee because that employee has disclosed, to a DOE official or to a DOE contractor, information that the employee reasonably and in good faith believes reveals a substantial violation of a law, rule, or regulation; or, fraud, gross mismanagement, gross waste of funds, or abuse of authority. *See* 10 C.F.R. § 708.5(a)(1), (3). Employees of DOE contractors who believe they have been discriminated against in violation of the Part 708 regulations may file a whistleblower complaint with the DOE and are entitled to an independent fact-finding by an investigator from the Office of Hearings and Appeals (OHA), a hearing by an OHA Hearing Officer, and an opportunity for review of the hearing Officer's Initial Agency Decision by the OHA Director. 10 C.F.R. §§ 708.21, 708.32.

B. Factual Background

The Complainant worked for BWXT and its predecessor, Martin Marietta, in Oak Ridge, Tennessee, from April 1991 until he was placed on long-term disability in January 2003. The Complainant worked in various positions first as a security inspector, then as a laboratory technician, and finally as a chemical operator. On September 30, 2001, the Complainant, while working as a chemical operator, communicated a safety-related concerns to a management official.

In early November 2001, the Complainant received counseling for sleeping while on duty. In February and March 2002, the Complainant was not interviewed for two positions for

^{2/} (...continued)

of his position. The Part 708 regulations allow the following relief (1) reinstatement, (2) transfer preference, (3) back pay, (4) reimbursement of your reasonable costs and expenses, or (5) such other remedies as are deemed necessary to abate the violation and provide the Complainant with relief. *See* 10 C.F.R. § 708.36(a). Thus, much of the relief the Complainant asks for is not within my ability to grant.

which he applied at BWXT. On May 17, 2002, the Complainant received a "pattern absence" letter. On June 14, 2002, the Complainant left work on two weeks of medical leave authorized by the BWXT medical department. This short-term medical leave was extended through January 2003 for reasons that are not clear from the record. In November 2002, the Complainant told the medical department that his personal physician had released him to return to work. Following a medical leave of longer than two weeks, an employee's physical and mental health are reviewed by BWXT's medical department before he is permitted to return to work. The Certified Physician's Assistant, in consultation with the Staff Clinical Psychologist, determined that in view of the Complainant's medical condition certain restrictions on his work assignments were appropriate. These restrictions required that the Complainant not engage in prolonged or strenuous exertion, not use a ladder over four feet, and not work at an unprotected elevation.

A medical case review meeting was held January 8, 2003. The attendees were the Certified Physician's Assistant, Staff Clinical Psychologist, the Complainant's supervisors, and the Labor Relations Representative. The medical case review meeting was held to determine if the Complainant could return to his prior position with the restrictions imposed by the medical department. At the medical case review, BWXT determined that the Complainant could not be permitted to return to work as a chemical operator with his work-related restrictions.

C. Procedural History

On October 20, 2003 the Complainant filed this whistleblower complaint with the Oak Ridge Operations Office of DOE under Part 708. Pursuant to the Part 708 Regulations, the matter was referred to the Office of Hearings and Appeals for an investigation on April 27, 2004. The OHA Director appointed an Investigator on May 5, 2004, and on February 2, 2005, she issued a Report of Investigation (ROI) concerning the complaint.

In the ROI, the Investigator conducted an initial factual and legal analysis of the Complainant's claims and made some preliminary determinations concerning possible protected disclosures and adverse personnel actions. Following the issuance of the ROI, I was appointed the Hearing Officer in this matter. A Hearing was held on August 16, 2006. At the Hearing, the Complainant was given the opportunity to introduce evidence that BWXT took adverse personnel actions against him by (1) sending him to an informal coaching session for sleeping while on duty, (2) not interviewing him for two jobs he applied for within BWXT, (3) issuing him a May 17, 2001 pattern absence letter, (4) placing

him on long-term disability.^{3/} Conversely, BWXT had the opportunity to demonstrate by clear and convincing evidence that it would have taken the above actions absent the Complainant's reporting of safety-related concerns.

II. Legal Standards Governing This Case

A. The Complainant's Burden

Under Part 708, the Complainant has the burden to establish by a preponderance of the evidence that he made a protected disclosure and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. 10 C.F.R. § 708.29. *See Ronald Sorri*, 23 DOE ¶ 87,503 (1993). In the present case, BWXT admits that the Complainant made protected disclosures and that it took the four personnel actions described by the Complainant. Hearing Transcript (Tr.) at 12. Later in this decision, I will review the evidence that I find demonstrates that the temporal proximity between the September 2001 protected disclosures and 2001 and 2002 personnel actions indicates the disclosures were a contributing factor to the personnel actions.

B. BWXT's Burden

Section 708.29 provides that once the employee has met his burden, "the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure." 10 C.F.R. § 708.29. BWXT argues it would have taken the same personnel actions against the Complainant absent the protected disclosures. BWXT makes specific arguments with respect to each of the adverse personnel actions.

With regard to the first action, BWXT asserts that all employees that are believed to have been sleeping while on duty receive, at a minimum, coaching and counseling to discuss the concerns associated with sleeping while on duty. The Complainant argues that he was not sleeping while on duty. With regard to the second personnel action, BWXT admits that the Complainant applied for two jobs. However, BWXT argues that the Complainant was not qualified for those jobs and, therefore, was not interviewed. The Complainant responds that he was qualified for the job positions for which he applied and should have been interviewed for those positions.

^{3/} In addition, the Complainant claims that BWXT allowed a fellow employee to harass him and to circulate rumors that he was a "snitch for DOE." The Complainant's supervisors testified that BWXT attempted to keep the two employees separated within the confines of the work environment. It is not BWXT's role or responsibility to ensure that employees get along. I believe that BWXT took appropriate steps to minimize the problem.

With respect to the third personnel action, BWXT argues that the Complainant did have a pattern of excessive absences from work. The Complainant responds that his absences from work did not show a pattern, especially if his vacation days were not considered as absences. Finally, BWXT argues that at the end of his medical leave the Complainant was too ill to return to his position. The Complainant stated that he should have been allowed to return to work. The Complainant believes if the restrictions kept him from his position as a chemical operator, BWXT should have been able to find another position for him. He claims that there were employees with far worse restrictions than his who worked for BWXT.

III. Hearing Testimony

At the Hearing, testimony was received from fourteen witnesses. The complainant testified and presented the testimony of two of his former co-workers, Mark Korly and Carl Smith. BWXT presented the testimony of: Les Reed, the division manager for environment safety and health for BWXT Y-12 at the time of the allegations; Ben Davis, operations manager for special materials; Earl Dagley, shift manager; Karl Vincent, chemical supervisor and the Complainant's direct supervisor; Janet Sexton, labor relations representative; Diane Grooms, staffing manager; Pat Fortune, department manager for the assembly and disassembly organization; Gary Bowling, general foreman in the garages and the fleet; Tonya Warwick, certified physician assistant in the medical department; Dr. Russ Reynolds, staff clinical psychologist; and Steve Laggis, manager of the special materials organization.^{4/} The Hearing testimony summarized below concerns the complainant's alleged disclosures and the four adverse personnel actions.

A. Division Manager for Environment, Safety, and Health

Les Reed, BWXT's Division Manager for Environment, Safety, and Health (Division Manager) testified that he first spoke with the Complainant in September 2001, when the Complainant called him. Hearing Transcript (Tr.) at 18. Soon after that conversation, he met with the Complainant. Tr. at 19. The Division Manager listened and took notes while the Complainant described his safety concerns. Tr. at 19. One safety concern related to a violation of the lock and tag-out procedure. Tr. at 20. The second concern was about ongoing work on a roof repair. Tr. at 20. The Complainant was concerned that water might enter and cause a safety concern. The final specific issue concerned the availability of proper respirators. Tr. at 22.

^{4/} All the job descriptions relate to the time during which the Complainant has alleged that he was retaliated against. Many of these employees have changed job titles since then; one has retired.

The Division Manager testified that the Complainant raised other concerns that appeared to fall into two categories. The first category was suggestions to improve efficiency of operations. Tr. at 20. The second category regarded the safety counsel which did not afford the Complainant an opportunity to participate because it did not meet during his shift. Tr. at 21.

The Division Manager stated that he toured the facility fairly soon after meeting with the Complainant. He testified that the Complainant's safety concerns had either been addressed or did not present an imminent safety hazard. Tr. at 23. Had the concerns been immediate, the Division Manager testified that he would have had the problem corrected immediately. Tr. at 24.

The Division Manager testified that he was contacted later in October 2001 by the Complainant regarding rumors being circulated by another employee that the Complainant had been talking to the Division Manager about safety issues. Tr. at 31. The Division Manager offered to arrange a meeting between the Complainant, the other employee and an uninterested third party. Tr. at 31-32. The Division Manager stated that the Complainant declined his offer. Tr. at 32.

B. Operations Manager for Special Materials

Ben Davis, BWXT's Operations Manager for Special Materials (Operations Manager) testified that the Complainant frequently submitted "I care/We care" safety suggestion memoranda. Tr. at 56. He stated that employees were encouraged to submit these memoranda by being issued a meal ticket if they submitted one. Tr. at 56-57. He was responsible for authorizing the meal ticket and remembered presenting more meal tickets to the Complainant than any other operator in his group. Tr. at 57.

On October 5, 2001, the Operations Manager escorted the Division Manager on his tour of the facility. Tr. at 57. He arranged for a meeting room for the Division Manager, the Complainant, and two other workers. Tr. at 57.

The Operations Manager testified that in late October 2001, a maintenance coordinator saw the Complainant asleep at his duty station. Tr. at 61. The Operations Manager stated that the Complainant was coached and counseled about the situation on November 2, 2001. Tr. at 62. The Operations Manager testified that a coaching and counseling session is a discussion with the employee and is the lowest level of discipline. Tr. at 62.

The Operations Manager stated that the Complainant was often absent before or after weekends or other breaks. Tr. at 67. He perceived this as a clear pattern of absence abuse.

Tr. at 67. Vacation is not considered when determining a pattern of absence. Tr. at 76. The Complainant was issued a "pattern absence" letter in May 2001.

The Operations Manager testified that when the Complainant tried to return to work after being on short-term disability leave, the medical office placed restrictions on his work. Tr. at 68. The restrictions provided that the Complainant was not allowed to take part in prolonged strenuous work, climb ladders, or work on elevated surfaces. Tr. at 68. The Operations Manager testified that the use of ladders or stairs was required in most of the functions his group performed. Tr. at 68. The Operations Manager testified that the work area has many mezzanines and significant heat stress in most areas. Tr. at 68. The Complainant asked the Operations Manager about specific jobs to which he could have been assigned. Tr. at 80. The Operations Manager reiterated that most of the jobs would have ladders or stress associated with them. Tr. at 80. The Operations Manager testified that the medical review board is an independent panel that evaluated whether the Complainant could return to his previous position or to another position. Tr. at 70.

Finally, the Operations Manager testified that he did not talk to any of the hiring managers about the two jobs the Complainant applied for. Tr. at 66-67.

C. Shift Manager

Earl Dagley, the Complainant's Shift Manager, testified that the Complainant was required to drive a fork lift, lift bags that weighed up to 100 pounds, and climb ladders. Tr. at 95-96. He characterized the Complainant's job as strenuous, especially because of the heat in the area and safety equipment that had to be worn. Tr. at 96. The Complainant brought safety concerns to him in the form of "I care/We care" memoranda. Tr. at 96. The Complainant was commended for raising the safety concerns by being given a meal ticket. Tr. at 97.

1. Counseling for Sleeping while on Duty

The Shift Manager testified that a member of management approached him on October 17, 2001, to say the Complainant was asleep. Tr. at 97-98; BWXT Ex. 7 at 1. The Shift Manager went to see the Complainant, who was standing when he arrived. Tr. at 98. He stated that the Complainant's eyes appeared to be red. Tr. at 98. He called labor relations and was advised to have a coaching and counseling sessions with the Complainant. Tr. at 100. Two weeks after the incident, the Complainant was coached and counseled to stay alert on the work site. BWXT Ex. 7 at 1. The Shift Manager testified that the Complainant did not lose any money or job opportunities because of the coaching and counseling session. Tr. at 102.

2. Not Being Interviewed after Two Job Applications

The Shift Manager testified that he was aware the Complainant applied for other jobs at BWXT. Tr. at 103. Neither of the hiring managers called him in connection with either of the jobs the Complainant had applied for. Tr. at 103.

[T]here was a gentleman, I do not know if he was part of the interview process for them or not. Dennis Nabors. Mr. Nabors told me that Mr. Tucker had bid on a job for them and he was close to getting interviewed. Asked me what I thought about Mr. Tucker. I said he was a fair employee.

Tr. at 103-04

3. Pattern Absence Letter

The Shift Manager testified that during 2001, he met with a Labor Relations employee to discuss employees with large numbers of absences. Tr. at 104. He was given a list of the individuals with poor attendance records. Tr. at 104. Included on that list was the Complainant. Tr. at 104. At that time, the Shift Manager counseled the Complainant that his attendance had to improve. Tr. at 105.

In May 2002, the Shift Manager requested that Labor Relations determine if there was a pattern to the Complainant's absences. Tr. at 105. Labor Relations determined there was a pattern and on May 17, 2002, issued a letter to the Complainant regarding the pattern of his absences. Tr. at 106; BWXT Ex. 8. The letter carried no monetary penalty. Tr. at 106. However, the Complainant was required to obtain a doctor's excuse to take sick leave. At least one other employee in the Complainant's group received a similar letter. Tr. at 106.

4. Being Placed on Long-Term Disability

The Shift Manager testified that he attended the January 2003 medical case review meeting regarding the Complainant. Tr. at 108. At the meeting, the impact of the Complainant's medical restrictions on his ability to return to his job was discussed. These restrictions directed that the Complainant not do strenuous labor, climb a ladder, or work on elevated platforms. The restriction also specified that the Complainant initially could only work a four-hour day. The restrictions indicated that the Complainant might be able to work up to a twelve-hour day. Tr. at 109. The Shift Manager testified that he did not believe that anyone could work in his group with the restrictions imposed on the Complainant. Tr. at 110. He stated that he only had one vote in the group and was the only one who would have been aware that the Complainant had reported health and safety matters. Tr. at 112.

D. Chemical Supervisor

Karl Vincent, a Chemical Supervisor, was the direct supervisor of the Complainant. Tr. at 126. He knew that the Complainant applied for two jobs outside their group. Tr. at 127. He did not speak to the hiring managers about the hiring decision. Tr. at 128. He never saw the Complainant asleep while on duty. Tr. at 130. He testified that the Complainant was a good employee. Tr. at 130.

The Chemical Supervisor testified about the Complainants' work restrictions. He stated that most of the medically mandated work restrictions under which people work at the plant are specific. Tr. at 139. In his view, the Complainant's restrictions were much broader than most. Tr. at 140.

E. The First Co-Worker

The first co-worker, Mark Corly, testified that he worked with the Complainant for a while. Tr. at 141. It was well known that the Complainant liked to write "I care/We care" memoranda and that he often pointed out safety violations. Tr. at 141. The co-worker testified that he was aware that the Complainant was asked to report safety violations to the DOE. Tr. at 141. He testified that the Complainant was not a "sloppy" operator nor would he violate procedures. Tr. at 144.

F. The Second Co-Worker

The second co-worker, Karl Smith, testified that he and the Complainant worked on the same shift. Tr. at 145. He stated that they were working the same piece of equipment on the day the Complainant was found sleeping while on duty. Tr. at 146. Usually two people were responsible for running that equipment, but that day the co-worker left to get some pizza at a party being held in their department. Tr. at 146. The co-worker testified that the area where the equipment is located is a high traffic area. Tr. at 146-47. He testified that he had not seen the Complainant asleep, nor did he see the Shift Manager in the area that day. Tr. at 147. The co-worker testified that everyone in the building was at the party. Tr. at 146-48. He stated that he was not aware on the day of the incident that the Complainant had been sleeping while on duty. Tr. at 148.

He testified that the Complainant often wrote "I care/We care" memoranda. Tr. at 149.

G. Labor Relations Representative

During 2001 and 2002, Janet Sexton, Labor Relations Representative, was responsible for applying and interpreting the two bargaining unit contracts with the union. Tr. at 153. She

was also responsible for enforcing Human Resources policies and procedures, discipline procedures, attendance procedures, addressing grievances, and arbitrations. Tr. at 153. As part of her job, she was responsible for administering BWXT's absence and discipline policy. Tr. at 153.

1. Counseling for Sleeping while on Duty

The Labor Relations Representative testified that she was first contacted in October 2001 regarding the Complainant's sleeping while on duty. Tr. at 153-54. She was asked for guidance as to how to handle the situation. Tr. at 154. She testified that sleeping while on duty is prohibited by the company handbook. Tr. at 154. According to the handbook, an individual found sleeping while on duty could be terminated. BWXT Ex. 11 at 2. She testified that the usual discipline for sleeping while on duty is a written reminder up to a day off and 12 months of probation. Tr. at 155; BWXT Exs. 14 & 15. The Labor Relations Representative stated that the Complainant received no discipline for sleeping while on duty. Tr. at 157. She testified that coaching and counseling are an informal corrective action. Tr. at 157. His pay was not reduced. Tr. at 159. Because he was coached and counseled only, the sleeping while on duty was not entered into his personnel file. Tr. at 159. The Labor Relations Representative was aware of two other situations where an employee was found sleeping while on duty and was only coached and counseled. Tr. at 160.

2. Pattern Absence Letter

The Labor Relations Representative stated that the next time she was involved in a personnel issue related to the Complainant was in May 2002. Tr. at 163. She testified that the Shift Manager called her because the management suspected the Complainant had an attendance issue. Tr. at 163. The Labor Relations Representative explained what a pattern absence is and why it is a problem. Tr. at 163-64.

Q. And what was the issue?

A. The issue was suspicion of patterned absence. Absences at work, and Mr. Dagley had called me. He had consulted with management, and called and would like, wanted labor relations to look into the issue to verify attendance issue or the absenteeism issue.

Q. And did you look into it?

A. Yes, Sir, I did.

Q. And what did you find?

A. We found that Mr. Tucker's a 12 hour shift worker. We found evidence of a patterned absence which is days absence connected to either holidays, SDO's, those days off.

- Q. What's an SDO?
- A. SDO is scheduled day off for a shift worker.
- Q. And when you say an absence, you're talking about a sick day.
- A. Yes, Sir
- Q. So a patterned absence is a sick day that is adjacent to a scheduled day off?
- A. Correct.
- Q. Weekend? Holiday, vacation also?
- A. Yes, Sir.
- Q. And why does the company have a problem with that?
- A. The company has a problem with that, first of all, it's outlined in our attendance, absence and attendance monitoring procedure that a patterned absence, the company has a problem with it because in a production area, you cannot plan work if a person has a long scheduled time off, unplanned, it makes a long absence. If you have a person that takes off on Friday and Monday and has the weekend scheduled there, or especially with a shift worker, if you have someone that has seven scheduled days off, and then there's a day off before and a day off after, that creates a long absence.
- Q. But people get sick from time to time. What's wrong with people taking off, taking advantage of the sick leave policy?
- A. No one's saying anybody cannot take advantage of a sick leave policy, but on an issue, when there's a suspicion of a patterned absence, it does have to be addressed.
- Q. You used the word suspicion. Can you explain that?
- A. Suspicion is when you review the record in its totality and you see mapped out without much doubt a continued pattern of an absence always on a certain time, and not any other date.

Tr. at 163-65. She testified that she reviewed the Complainant's attendance sheet. Tr. at 166.

- A. Yes, this is my data collection and what I've prepared for this to show Mr. Tucker's absenteeism record for a 12 hour shift worker. The first H there, of course, is a holiday. But the M's stand for the midnight shift, which is the term the hourly use, which is a 7:00 a.m. to 7:00 p.m. And the yellow, the days highlighted in yellow are scheduled days off. Full scheduled shifts off.
- Q. So that's the SDO's you were talking about earlier?
- A. Yes, Sir.
- Q. And that would include holidays, weekends, and vacations?

A. No. These are only scheduled days off. This doesn't include any vacation.

Q. Go ahead.

A. And the 12 hour shift workers, they do not get to celebrate weekends, this is scheduled days off. The AA shift, the 7:00 a.m. to the 7:00 p.m. And the X's across these labeled days are days absent. Disability absences. Short term disability absences.

* * *

A. For the year 2001, you start in January, and you see an absence on the 10th and 11th and then you have seven scheduled days off. So you have an absence before your SDO, seven. You go in to the month of February, it's the same. The pattern continues. Absence on the 18th and 19th, and then scheduled days off.

The month of March continues, three days off. Sick days off, and then seven scheduled days off and then you go into the midnight shift with four sick days.

The month of April, the same.

Q. So - -

A. And then the month of May is the only month that there's a lot of absences there, but the month of May, I think the 30th of May was the only day that we identified that wasn't linked to a pattern.

Tr. at 166-68. She testified that only one day of all of the Complainant's absences in 2001 was not part of the patterned absence. Tr. at 170. The Labor Relations Representative testified that the Complainant's pattern was to take leave prior to and/or after a holiday or scheduled day off. She testified that the Complainant's pattern demonstrated excessive leave compared to other employees. Tr. at 171. She recommended that the Complainant be issued a pattern absence letter, requiring the employee to have a doctor's verification when he is absent for the absences to be paid. Tr. at 170-71.

3. Placing the Complainant on Long-Term Disability

The Labor Relations Representative testified that she was present at the medical case review meeting on January 8, 2003, when the committee reviewed the need for work restriction to be placed on the Complainant. Tr. at 181. She stated that she has attended many medical case reviews. Tr. at 191. She testified that at the meeting the Complainant's manager indicated he did not believe his group could find work for an employee with the Complainant's medical restrictions. Tr. at 188.

H. Staffing Manager

Diane Grooms, BWXT's Staffing Manager, is responsible for supervising the hiring process. Tr. at 196. The Complainant applied for two jobs in early 2002. Tr. at 196. She testified that the person responsible for the actual hiring decision came to her and asked for a copy of the applicant's resume which she retrieved from the employee's personnel file. Tr. at 197. BWXT submitted into the record the Complainant's 2002 resume. BWXT Ex. 22. She explained that an applicant is responsible for confirming that the resume on file is updated. Tr. at 198.

The Staffing Manager testified that when the Complainant applied for the two jobs, his bids were sent to the hiring organizations along with his resume. The hiring organization determined that the Complainant's resume indicated he did not to meet the minimum requirements of the job postings. Tr. at 199. He was not given an interview for either position. Tr. at 199. The Staffing Manager testified that the hiring manager made the decision not to interview the Complainant. Tr. at 199. She stated that the experience listed on the Complainant's resume, while similar to the requirements for each of the jobs, nevertheless did not actually meet the minimum requirements of either position. Tr. at 200. "And the chemical operator experience and the other experience listed on your resume is not what was deemed a minimum requirement on the assembly person A and B position." Tr. at 200. "Under the necessary qualifications . . . , it says it requires three year of on the job training in assembly operations in the Y-12 plant. . . . [Y]ou do not meet the minimum qualifications according to the resume that was on file." Tr. at 202.

I. Assembly/Disassembly Department Manager

Pat Fortune, The Assembly/Disassembly Department Manager, was responsible for hiring for the first of the two positions that the Complainant applied for in early 2002. Tr. at 206. She was the final decision maker as to who would be interviewed and who would be given the position. Tr. at 206. After reviewing the job description and the Complainant's resume, she did not believe that he met the minimum requirements and stated the Complainant was therefore not interviewed for the position. Tr. at 207. She stated that she did not talk to the Complainant's managers regarding his application for the position. Tr. at 208. She stated that she did not know who his managers were. Tr. at 208. She stated that hiring decisions considered seniority and experience factors but, in order to interview, an individual must meet the minimum qualifications. Tr. at 209.

J. General Foreman

Gary Bowling, a General Foreman, was responsible for hiring for the second of the two positions that the Complainant applied for in early 2002. The General Foreman was

responsible for supervising the garages in early 2002. Tr. at 212. He testified that the Complainant's resume did not indicate that he had the minimum requirements of six years practical experience as a mechanic. Tr. at 213. He testified that although the Complainant is a certified mechanic, that does not necessarily mean he has six years of practical experience. Tr. at 215. He stated that he did not speak to the Complainant's managers about his applying for a job at the garage. Tr. at 214.

K. Certified Physician's Assistant

Tonya Warwick, a Certified Physician's Assistant, is responsible for evaluating employees for occupational illnesses and injuries, and prior to returning to work after a significant medical leave. Tr. at 218. She and the Staff Clinical Psychologist evaluated the Complainant in December 2002. Tr. at 218. She testified that the restrictions on the Complainant's work involved no prolonged or strenuous exertion, no use of a ladder over four feet, and no work at an unprotected elevation. Finally, he could only work four hours a day for the first one to two weeks after his return. Tr. at 219. The restrictions were based on an interview with the Complainant, information from his personal physician, and her physical exam. Tr. at 221.

The Certified Physician's Assistant testified that the Complainant's personal physician stated that he could return to work. However, she testified that BWXT's medical department does not always follow a personal physician's recommendation. Tr. at 224. She believes that an outside doctor does not know the details of the job requirements. Tr. at 225.

The Certified Physician's Assistant also participated in the medical case review held on January 8, 2003. Tr. at 220. She did not remember any discussion of the Complainant's having reported health and safety issues. Tr. at 221.

L. Staff Clinical Psychologist

The Staff Clinical Psychologist, Russ Reynolds, testified that he has participated in many return to work evaluations. Tr. at 227. In these evaluations, he has to understand the person's job responsibilities and do a functional assessment of the person's fitness to perform those duties. Tr. at 227. He focuses on the emotional, psychological, and psychiatric fitness. Tr. at 227. He reviews medical files to evaluate whether work restrictions are necessary for an individual. Tr. at 228.

The first step in returning to work when a person has been out of work for more than two to four weeks is a written release from their personal physician. Tr. at 228. The Staff Clinical psychologist testified that in half the return to work situations, BWXT follows the

personal physician's recommendation. Tr. at 229. The medical department does not always follow the personal physician's recommendations because the personal physician is not in a position to assess the person's job responsibilities. Tr. at 229.

The Staff Clinical Psychologist stated that the Complainant came to see him on June 14, 2002. The Complainant was concerned about the way he was feeling. Tr. at 230. The Staff Clinical Psychologist believed the Complainant was clinically depressed. Tr. at 230. He suggested and the Complainant agreed that the Complainant should not be at work. Tr. at 230. He authorized two weeks of medical leave in order for the Complainant to be able to consult with his personal physician. Tr. at 231.

The Staff Clinical Psychologist was involved in the Complainant's fitness to return evaluation in December 2002. Tr. at 231. He testified that the Complainant told him that he had pressured his doctor to allow him to come back to work. Tr. at 234. The Staff Clinical Psychologist believed that the Complainant was no better, and perhaps worse, than he had been prior to his going on medical leave. Tr. at 234. The Staff Clinical Psychologist was concerned, after hearing the Complainant's current symptoms, that the Complainant would not be able to tolerate working as a chemical operator because of the physical exertion required in the job. Tr. at 235.

The Staff Clinical Psychologist testified that the Complainant did well on a test of concentration and memory. Tr. at 236-37. However, the Staff Clinical Psychologist was concerned because the Complainant continued to complain about not being able to sleep. Tr. at 237-38.

The Staff Clinical Psychologist and the Certified Physician's Assistant met and agreed on the restrictions to be placed on the Complainant's return to work. Tr. at 240. Then they both participated in the medical case review on January 8, 2003. Tr. at 240. In these meetings, he and the Certified Physician's Assistant meet with the employee's management, Labor Relations, and someone from Human Resources. Tr. at 240. The purpose of the meeting is to discuss employees' functional status. Tr. at 241. In the case of the Complainant, the decision was that management could not accommodate his restrictions. Tr. at 241. The Staff Clinical Psychologist did not remember any mention of the fact that the Complainant had raised health and safety concerns in the past. Tr. at 242.

M. Manager of Special Materials Organization

Steve Laggis, the Manager of Special Materials Organization (Manager), testified that the Complainant worked in the Special Materials Organization. Tr. at 249. He first spoke with the Complainant in July 2001, when the company was conducting a rolling safety focus. Tr. at 249. He had a meeting in October 2001 with the Division Manager for Safety and

Health regarding issues raised by the Complainant. Tr. at 250. The Manager stated he was aware of a number of the issues. Tr. at 250. He believes that at the time he met with the Division Manager for Safety and Health, all of the issues were either resolved or “on his radar screen” to be resolved. Tr. at 252.

The Manager stated that he was told the Complainant had been found sleeping while on duty in October 2001. Tr. at 252. He told the Shift Manager to contact Labor Relations for guidance. Tr. at 253. He knew that the Complainant was coached and counseled as a result of the incident. Tr. at 253.

The Manager testified that he was unaware that the Complainant had applied for two other positions. Tr. at 253. He was not contacted by either hiring manager for the positions. Tr. at 253.

The Manager stated that the only time he spoke with anyone outside of his organization about the Complainant was in regard to the Complainant’s attendance. Tr. at 253. At that time, he spoke with the Labor Relations Representative who indicated that there was a pattern to the Complainant’s absences. Tr. at 254.

The Manager participated in the Complainant’s medical case review on January 8, 2003. Tr. at 255. The medical case review is an opportunity for him to hear the medical staff’s opinions. Tr. at 255. It is also an opportunity to have an independent evaluation. Tr. at 257. There was no discussion during the medical case review that the Complainant had raised safety and health concerns. Tr. at 257. It was his decision as to whether the Complainant could return to work with the restrictions specified by the medical department. Tr. at 255.

N. The Complainant

1. Counseling for Sleeping while on Duty

The Complainant contends that it would be impossible to sleep where he was accused of sleeping. There were doors and hallways. Tr. at 71, 131, 146-47, 279. He testified that many people were in the area where he was working because of the pizza party, so it was too noisy and crowded for him to have slept. Tr. at 72. He also testified that he was not alone at his post long enough to have slept. Tr. at 280. Further, he testified that had a supervisor seen him asleep, the supervisor would have woken him. Tr. at 73. Alternatively, the supervisor would have warned the Complainant’s first line supervisor because a malfunction in the machine he was monitoring could have catastrophic results. Tr. at 131. Finally, he asserts the Shift Manager could not have seen that his eyes were red because he always wore tinted safety glasses. Tr. at 148, 279.

2. Pattern Absence Letter

The Complainant testified that if his vacation days were removed from his absence information, there would not be a pattern of absences. Tr. at 282. He also claimed that most of his absences were for Family Medical Leave (FMLA) and could not be counted in determining whether he had a patterned absence. Tr. at 136. He testified that he had a great deal of FMLA leave. Tr. at 136. He claimed he cannot be coached or counseled for FMLA.^{5/} Tr. at 183. In addition, he testified that other employees were absent more often than he was. Tr. at 282.

3. Not Being Interviewed after Two Job Applications

The Complainant testified that he was qualified for the two positions for which he applied. The first position was in the assembly and disassembly department. Tr. at 200-01. The Complainant testified that his experience as a laboratory technician qualified him for the position. Tr. at 200. He testified he was interviewed for the assembly position in 1997. Tr. at 208.

Regarding the second position as a mechanic in the garage, he testified that he is a certified mechanic and, therefore, was qualified for the position. Tr. at 204, 214-15. He testified that it should have been apparent he had experience as a mechanic because he was a certified mechanic. Tr. at 214-15.

4. Being Placed on Long-Term Disability

Finally, the Complainant testified that he should not have been placed on long-term disability. Tr. at 284. He argued that there were employees with far greater restrictions who were accommodated by BWXT. Tr. at 246, 285. He also contended that the restrictions were temporary. Tr. at 79, 189. The Complainant testified that there were many jobs in his department he could have done, such as taking readings, running the [reactors], and loading and unloading. Tr. at 80. He believes he should have been permitted to return because it would have taken time for his security clearance to be reinstated. Tr. at 190-91. He claimed that by the time his security clearance was reinstated, the work-related restrictions would have been removed. Tr. at 190-91.

The Complainant tried to find a job outside his department prior to going on medical leave. Tr. at 283.

^{5/} The Labor Relations Representative agreed that the Complainant could not be coached or counseled for FMLA leave. However, she stated it can be used when determining whether there is a pattern in an individual's absences. Tr. at 185.

Hey, I bid out. I bid out on assembly. Now you have seen my resume. College education, certified in half a dozen different things, and there's no way that I shouldn't have been eligible for that job. None whatsoever.

Had been interviewed before for it. The only reason I didn't get it then was people above me in seniority had taken the job. But this time, they didn't interview me. . . .

Now the garage mechanic. Yeah. I didn't have on there I had six years' experience. But I was a certified mechanic and a certified motorcycle mechanic. That right there in itself should tell you that you do not get your certifications unless you do a little hands on work.

I could not even get an interview. So I guess a man has to be just an out and out genius. But I guarantee you if you go and pull the two people who did get the jobs information, that neither of them are certified mechanics either.

So what it boils down to is, hey, them not letting me come back to work. Granted with the disease I have now, who knows if I could have worked and we'll never know. That's just plain and simple.

I tried to come back to work. I made an effort at it. But like I said, I was blocked. And I find it just unusual the way I was blocked because the time that I'd been in that building, I had never seen a medical review ever used before.

Tr. at 283-84. He disputed that he pressured his personal physician to release him to return to work. Tr. at 245.

IV. Analysis

A. The Complaint was Timely Filed

In its submissions, BWXT contends that the individual's complaint of retaliation was not timely filed. Part 708 provides that "[y]ou must file your complaint by the 90th day after the date you knew, or reasonably should have known, of the alleged retaliation." 10 C.F.R. § 708.14(a). The complaint was filed on October 20, 2003. The Complainant was placed on long-term disability on January 8, 2003.

In a 2003 decision, a Hearing Officer discussed the relevant regulatory language, and whether and under what circumstances complaints filed more than ninety days after a

retaliation can be considered as timely filed under Part 708. He found that the complainant should be allowed sufficient time to recognize that a personnel action taken by management was indeed retaliatory in nature. *See Steven F. Collier* (Case No. VBH-0084), 28 DOE ¶ 87,036 at 89,257 (2003); *see also Gary S. Vander Boegh*, 28 DOE ¶ 87,040 at 89,283-84 (2003)(certain personnel actions, while not regarded as neutral in their impact by the complainant, were not so overtly punitive in nature that a reasonable person “should have known” that they were Part 708 retaliations at the time that they took place). This is because employees often are not familiar with the way that personnel decisions are made and find it difficult to determine whether a negative action concerning a request is retaliatory and when a lengthy delay in providing a promised benefit becomes a determination to deny that benefit.

In the present case, the severity of the personnel actions raised by the Complainant escalated over time. I must determine at what point after the January 8 action the Complainant, as a reasonable person “should have known” that the action taken against him were a Part 708 retaliation. I must consider the Complainant’s state of mind in order to determine when he knew or should have known that a Part 708 retaliation had taken place, and to measure the ninety-day filing requirement from that time.

During questioning by the attorney for BWXT, the Complainant stated that prior to filing the written statement on October 20, 2003, he met with a number of people at DOE trying to resolve the situation. Tr. at 261. During January 2003, he “went to the Federal Building” to rectify the situation and get his job back. Tr. at 261. Section 708.14(d) of the regulation states that

[i]f you do not file your complaint during the 90-day period, the Head of Field Element or EC Director (as applicable) will give you an opportunity to show any good reason you may have for not filing within that period, and that official may, in his or her discretion, accept your complaint for processing

10 C.F.R. § 708.14(d). I therefore believe that because the actions increased over time the Complainant was not fully aware that BWXT’s unwillingness to allow him to return to work constituted a retaliation until the summer of 2003.

The record indicates that BWXT did not raise the timeliness issue with the Employee Concerns Manager when notified of the filing of the complaint, 10 C.F.R. §708.16(a), and at no time during the investigation was the issue raised. Instead, BWXT did not raise this issue until just prior to the hearing. Accordingly, I find that the complaint was timely filed in accordance with the provisions of 10 C.F.R. § 708.14 and will consider the merits of the complaint.

B. Whether the Complainant Has Met the “Contributing Factor” Test

Under 10 C.F.R. § 708.29, the Complainant must show that his protected disclosures were a *contributing factor* with respect to a particular adverse personnel action taken against him. *See Helen Gaidine Oglesbee*, 24 DOE ¶ 87,507 (1994). A protected disclosure may be a contributing factor to an adverse personnel action where “the official taking the action has actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action.” *Ronald A. Sorri*, 23 DOE ¶ 87,503 at 89,010 (1993) *citing McDaid v. Dep’t of Hous. and Urban Dev.*, 90 FMSR ¶ 5551 (1990). *See also Russell P. Marler, Sr.*, 27 DOE ¶ 87,506 at 89,056 (1998).

I conclude that the Complainant has established by a preponderance of the evidence that his protected disclosures were contributing factors to the personnel actions. I base this conclusion on a finding that there are both knowledge and proximity in time between the protected disclosures made by the complainant and his allegations of retaliation.

With respect to knowledge of the disclosures, the Complainant made many disclosures to his supervisors, including meeting with the Division Manager in September 2001. Clearly, the Complainant’s supervisors, who were responsible for the actions taken against him, had actual knowledge of these disclosures. Indeed, BWXT admits that the Complainant’s supervisors had actual knowledge of the disclosures the Complainant repeatedly made.

With regard to timing, the most obvious of the disclosures took place in September 2001. The first alleged retaliation taken against the complainant occurred in October 2001, with him being coached and counseled for sleeping while on duty. I conclude the disclosures were a contributing factor to an alleged ongoing retaliation. *See Jimmie L. Russell*, 28 DOE ¶ 87,002 at 89,014 and 89,025-26 (2000) (protected disclosure found to be contributing factor when it occurred proximate in time to the beginning of an ongoing retaliation).

Accordingly, with respect to the alleged retaliations, I have determined that the Complainant has shown by a preponderance of the evidence that adverse personnel actions took place and meet the criteria under Part 708.

C. BWXT’s Showing

Given that the Complainant has made his showing, BWXT must demonstrate by clear and convincing evidence that it would have taken the same personnel actions absent the protected disclosures. *See* 10 C.F.R § 708.29. As discussed below, I find BWXT has made that showing.

1. Counseling for Sleeping While on Duty

While the Complainant denies that he was sleeping while on duty, the weight of the testimony and evidence persuades me that BWXT was justified in coaching and counseling the Complainant for sleeping while on duty. The coaching and counseling the Complainant received is the lowest level of discipline possible. Tr. at 157; BWXT Ex. 13 at 2. There was testimony by the Labor Relations Representative that coaching and counseling is not actually discipline. Tr. at 157. The coaching and counseling were not made part of the Complainant's employment record. BWXT showed that the Complainant received less discipline than most employees found sleeping while on duty. I believe BWXT took the same action against the Complainant for sleeping while on duty that it would have taken absent his disclosures.^{6/}

2. Not Being Interviewed for Two Job Applications

The Complainant did not receive interviews for two jobs that he applied for in early 2002. BWXT provided significant evidence that the Complainant did not have the requisite experience on his resume for either position.

The evidence indicates that both job postings specified the specific necessary qualifications. BWXT Exs. 20, 21. The evidence further indicates that the Complainant's resume on file at the time he applied for both positions did not contain the necessary qualifications. BWXT Ex. 22. I found the testimony of the Staffing Manager and the two persons responsible for choosing who would be interviewed convincing. All three testified that they did not believe the Complainant's resume showed he had the minimum qualifications for the positions. Tr. at 199, 207, 212.

Further, the Staffing Manager and the two people responsible for deciding who to interview and hire all confirmed that they did not know that the Complainant had made protected disclosures and they did not speak to anyone in the Complainant's management team. Therefore, I find there is a clear and convincing demonstration that the Complainant's lack of experience made him unqualified for either position. Therefore, I am convinced he would not have been interviewed absent the protected disclosures.

3. Pattern Absence Letter

The Complainant received a pattern absence letter on May 17, 2002. BWXT has shown that pattern absence letters were routinely issued to employees. The evidence indicated that

^{6/} In any event, since there is nothing in the Complainant's permanent record to show that he was coached and counseled, Tr. at 157, there is no remedy that we can provide.

the Complainant's pattern of absences were more severe than some employees that received such a letter. The Labor Relations Representative reviewed the Complainant's absence chart and convinced me that a very definite pattern of absences prior to a holiday, scheduled day off or weekend could be seen in the Complainant's absences. BWXT presented 31 examples of pattern absence letters that had been presented to other employees. The Labor Relations Representative's testimony convinces me the Complainant had a pattern of absences and that BWXT would have issued the pattern absence letter to the Complainant absent his protected disclosures.

4. Being Placed on Long-Term Disability

BWXT placed the Complainant on long-term disability when they were unable to find a position for him with the work restrictions placed by the BWXT medical department on his return. BWXT showed that the medical department had reasonable concerns about the Complainant's ability to do strenuous work. The Complainant admitted to the Staff Clinical Psychologist that he had pressured his personal physician into releasing him to work. The Complainant now denies that he made this statement, but I found the Staff Clinical Psychologist more convincing on this matter. The Staff Clinical Psychologist further testified that the Complainant had symptoms that concerned him, such as night sweats which keep him from sleeping and causing him to be extremely fatigued during the following day.

The Complainant argues that he should have been allowed to return to work with the work restrictions specified by the medical department. The Complainant argues there are jobs that he could perform with his work restrictions.

The Complainant believes many people work at BWXT with more restrictions than his. BWXT presented evidence that the restrictions under which he would have had to work would have made it impossible for him to work as a chemical operator. The Complainant attempted to find another position with BWXT but could not. He does not argue that the company was required to find a position for him or had done that in the past. Therefore, I find that BWXT has shown by clear and convincing evidence that it would have taken the same action absent the Complainant's protected disclosures.

V. Conclusion

The Complainant made protected disclosures by reporting safety and health violations. The Complainant has shown by a preponderance of the evidence that BWXT took adverse personnel actions against him and that his protected disclosures were a contributing factor in those actions. However, BWXT has shown by clear and convincing evidence that it would have taken the personnel actions absent his protected disclosures.

Accordingly, I will deny Mr. Tucker's request for relief under 10 C.F.R. Part 708.

It is Therefore Ordered That:

(1) The complaint for relief under 10 C.F.R. Part 708 submitted by Franklin Tucker, OHA Case No. TBH-0023, is hereby denied.

(2) This is an initial agency decision, which shall become the final decision of the Department of Energy unless, within 15 days of issuance, a notice of appeal is filed with the Office of Hearings and Appeals, in which a party requests review of this initial agency decision.

Janet R. H. Fishman
Hearing Officer
Office of Hearings and Appeals

Date: April 9, 2007

